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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 712

JOHN D. GIBBS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1961

No.

JOHN D. GIACO,

Petitioner,

—vs.—

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on January 12, 1962.

Opinion Below

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix B, *infra*, pp. 29-37.

Jurisdiction

The judgment of the Court of Appeals was entered on January 12, 1962, and is reprinted in the Appendix B to this petition at pages 39, 40. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254 (1).

Questions Presented

1. Whether Government's destruction of handwritten notes, made by agents of the F.B.I. during oral interviews with prosecution witnesses, with the result that those notes could not be delivered to the Trial Court for its inspection during trial after proper and timely demand by the petitioner, was a refusal to comply with the requirements of Title 18 U.S.C., Section 3500, requiring the imposition of sanctions under Sub-section (d) of that statute?

2. Whether statements signed by prosecution witnesses and produced pursuant to Sub-section (e)(1) of Title 18 U.S.C., Section 3500, which the testimony discloses, were not identical with and did not incorporate the handwritten notes made by F.B.I. agents during oral interviews with the prosecution's witnesses, were properly substituted for documents called for under Sub-section (e)(2)?

3. Whether a United States District Court can try a petitioner charged with violations of Title 18 U.S.C. 2314 and 2315 where the underlying theft, which is a necessary element of any such prosecution, was allegedly committed in a foreign jurisdiction by unknown and unnamed persons, thus attempting to give such statutes extraterritorial application?

4. Whether petitioner, by being tried in the United States for a crime, the basic and necessary element of which was a crime allegedly committed in a foreign country, by unknown and unnamed persons, was deprived of his Constitutional right of compulsory process to obtain witnesses to refute evidence of the foreign crime?

Statutes Involved

Title 18, U.S.C., Section 3500(a), (b), (c), (d), (e)(1), (e)(2), (App. A. *infra*, p. 24 ff.);

Title 18, U.S.C., Section 2314 (App. A. *infra*, p. 21 ff.);

Title 18, U.S.C., Section 2315 (App. A. *infra*, p. 22 ff.);

Title 18, U.S.C., Section 371 (App. A. *infra*, p. 23).

Rules Involved

Rule 15 of the Federal Rules of Criminal Procedure (App. A. *infra*, p. 26 ff.).

Amendments to Constitution of United States Involved

Amendment VI (App. A. *infra*, p. 28).

Statement

Petitioner, John D. Greco, was convicted by the District Court of the Southern District of New York after a trial without a jury, under an indictment charging him with transporting and receiving stolen Canadian securities in violation of Title 18, U.S.C., Sections 2314 and 2315, and with conspiring with his co-defendant, Edward B. Loree, to commit these offenses in violation of Title 18 U.S.C., Section 371.

The prosecutor and the attorneys for the petitioner stipulated (Appellant's App. 30a-32a) that if the

Chief Accountant of the Caisse Nationale d'Economie, located at 41 St. James Street, West, Montreal, Canada, were called, he would testify to certain facts which took place in Canada from which the Court below held that the Trial Court properly inferred the bonds involved were stolen in Montreal, Canada.

Immediately prior to trial, Edward B. Loree pleaded guilty. While awaiting sentencing he was the principal government witness and he gave the only testimony connecting the petitioner to the charges in the indictment.

Loree testified that early in April, 1958, after he returned to New York from Haiti, he received a message to telephone petitioner concerning a deal. Which he did. At a meeting shortly thereafter the petitioner proposed that Loree sell some Canadian bonds for him (Appellant's App. 37a). During a second meeting, petitioner told Loree "they were stolen Canadian Municipal Bonds" (Appellant's App. 39a). Petitioner delivered to him Canadian Bonds in the face amount of $36,500 (Appellant's App. 42a).

Loree testified that he took the bonds to Miami (Appellant's App. 46a), and went to a Mr. Elrod's office at the beginning of a week-end, and left the bonds with Mr. Elrod (Appellant's App. 47a). On Monday, when Loree returned to Elrod's office, Elrod told Loree that the bonds were stolen, and that Loree better get rid of them (Appellant's App. 49a).

Loree testified that he was arrested by the F.B.I. in Florida, with the bonds in his possession. He was immediately interviewed by agents of the F.B.I., and

answered all of the agents' questions. Handwritten notes were made of these interviews (Appellant's App. 124a, 125a). Loree was then released on his own recognizance and asked to report to the F.B.I. office in New York.

The petitioner's witness, William Baker, a disbarred attorney, who was serving a prison term for larceny, contradicted Loree. Baker testified that he had first met the prosecution witness Loree in the early part of January, 1958 (Appellant's App. 196a), when Loree desired to borrow money (Appellant's App. 197a, 199a). In February or March of 1958, he and Loree discussed Canadian bonds (Appellant's App. 200a) in Baker's office, at which time Loree said that he was going to Haiti and showed Baker his passage tickets to Haiti (Appellant's App. 202a, 203a). Loree told Baker that he had a satchel full of these "hot", unregistered or bearer bonds (Appellant's App. 201a).

In a conversation which took place about a week or two after Loree told Baker that he (Loree) had returned from Haiti, Loree told Baker he had been in Florida to dispose of some of the hot bonds (Appellant's App. 204a) and that Loree knew that Greco had been arrested (Appellant's App. 208a); that Greco had nothing to do with the hot bonds (Appellant's App. 208a, 212a), but that he (Loree) intended to take full advantage of Greco's arrest in an attempt to get himself out of the mess (Appellant's App. 209a).

Thus according to Baker's testimony, Loree had the Canadian Bonds before he went to Haiti. Loree testified that he had first heard of, and received, the

bonds from the petitioner after he returned from Haiti.

It was stipulated that if the five agents who interviewed the witness Loree in Florida were to testify, they would testify that the agent, John P. Lenihan, took notes of interviews with Loree (Appellant's App. 187a, 188a), and that "Government's Exhibits for Identification 2" (Appellant's App. 242a-246a) and "6" (Appellant's App. 247a-258a) reflected the contents of these notes, and that the notes were destroyed after the above reports were completed. Government's Exhibit 6 for Identification was dictated 17 days after the oral statements by Loree, and finished 22 days after the oral statements. Government's Exhibit 2 for Identification was an alleged unsigned statement of Loree, dated April 22, 1958.

Neither Government's Exhibit 2 nor 6 for Identification was a statement required to be given to the Trial Court or to the petitioner by Title 18, U.S.C., Section 3500.

Loree also was interviewed by three Special Agents of the F.B.I. in New York City.

F.B.I. Agent Joseph D. Milenky testified that he was the Special Agent in charge of this investigation (Appellant's App. 160a); that he interviewed Loree at least three times (Appellant's App. 161a); that he made handwritten notes of an interview with Loree, which took place on May 20, 1958. Sometime after the oral statement another F.B.I. agent dictated the signed statement dated May 20, 1958 (Appellant's App. 168a) (Government's Exhibit 4 for Identification) (Appellant's App. 258a, 261a); that Loree was

consulted while this signed statement was being dictated (Appellant's App. 168a); that after Loree signed the dictated statement, Agent Milenky destroyed his notes. The signed statement was not identical with the notes (Appellant's App. 170a, 175a). The notes were not incorporated in the signed statement (Appellant's App. 173a). If the notes had contained a direct quote, that quote would be in quotation marks in the notes (Appellant's App. 169a, 170a). The Agent himself decided whether to keep or destroy the notes; and if the witness would not sign the typed statement, the Agent would preserve his notes (Appellant's App. 172a).

F.B.I. Agent Robert L. Latchford testified that he helped in preparation of this prosecution in 1958, and assisted the prosecutor in preparing for the trial (Appellant's App. 180a). He interviewed Loree in New York and took handwritten notes. He dictated a typewritten statement, which Loree signed, dated April 24, 1958. (Government's Exhibit 3 for Identification) (Appellant's App. 246a-258a) and he destroyed his handwritten notes after he finished the typed statement.

Albert Dekoninck was another witness for the Government. He testified solely with regard to alleged prior similar transactions by the petitioner. At the time of his testimony, he was awaiting sentence for attempted grand larceny.

Dekoninck had been interviewed by Agent Milenky on June 9, 1958 (Appellant's App. 161a) and at another time. Agent Milenky testified that during these interviews he made notes, and that he destroyed his notes after Dekoninck signed a statement. The

notes had not been incorporated in the signed statement (Appellant's App. 173a), nor were they identical with the signed statements.

A typewritten and signed statement of Albert C. Dekoninck, dated June 9, 1958, was produced by the Government and turned over to the defendant (Government's Exhibit 8 for Identification) (Appellant's App. 287a-289a).

The petitioner, after the direct testimony of Government witness Loree, and again after the direct testimony of Government witness Dekoninck, moved, pursuant to Title 18 U.S.C., Section 3500, that the Government produce all statements of the witnesses. The Trial Court ruled that the petitioner was entitled to have any statements the witnesses made (Appellant's App. 106a), and that the Government should produce for the Courts' consideration whatever the witness said which was taken down and reduced to writing (Appellant's App. 107a).

After the testimony of the F.B.I. Agents, the petitioner moved to have the Trial Court strike the testimony of the witnesses Loree and Dekoninck; and for a mistrial, pursuant to Title 18, Section 3500. The Court denied the petitioner's motions, and this denial was affirmed by the Circuit Court of Appeals (Appendix B, *infra*, p. 29 ff.).

Reasons for Granting the Writ

1. It is respectfully submitted that the Court below made an erroneous decision with regard to the so-called "Jenks Act".

The destruction of the handwritten notes, by the agents who made the notes during oral interviews of the Government's witnesses (thus putting the notes out of existence at the time of trial), whether or not there was intent to suppress evidence on the part of the Government, was a refusal to produce in compliance with the Trial Court's order that the Government should produce for the Court's inspection whatever the witness said "which was taken down and reduced to writing (Appellant's App. 107a)". The destruction was tantamount to a refusal to produce under Sub-section (d), requiring the imposition of Section 3500 sanctions.

As the Court below said, the petitioner is raising the same question urged on this Court in *Campbell v. United States*, 365 U.S. 85 (1961), namely "that destruction [of notes] without regard to circumstances should be regarded [i.e., as non-compliance under 3500]". In the *Campbell* case, this Court found that the record did not provide it with an opportunity to decide "this important question". In the instant case, the Court of Appeals found that "all material elements lacking in Campbell are present (Appendix B, *infra*, p. 38)."

The original handwritten notes made by the Government Agents during the course of oral interviews should have been preserved, as the Government must preserve all original statements for possible use at a trial. In the alternative, the Government must face the loss of the testimony of a witness.

Under Sub-section (b) of Title 18 U.S.C., Section 3500, after a witness has testified on direct examination, the defendant is entitled to any statement of the witness in possession of the United States which relates to the subject matter to which the witness has testified. The statute directs in (e) that the term "statement" means (1) a signed or adopted statement, (2) a recording which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Government, and recorded contemporaneously with the making of the oral statement.

The Trial Court's ruling that the Government produce for its inspection whatever the witness said "which was taken down and reduced to writing (Appellant's App. 107a)." was not fulfilled by the Government and the ruling was left hanging in Limbo.

The decision as to delivering a document to the petitioner was up to the District Judge. Where there is any question of whether a particular document is a "statement" or otherwise compelled by the statute to be so delivered, such document must be produced to the Trial Judge for determination. "Indeed, any other procedure would be destructive of the statutory purpose." *Palermo* v. *United States*, 360 U.S. 343 (1959).

This duty of the Trial Court may not be barred by any act of the Government, either intentional or unintentional, because this would destroy the Trial Court's statutory affirmative duty of insuring that the Government's interest in avoiding disclosure does not bar the accused from having statements to which he is entitled. *Campbell* v. *United States*, *supra*.

The record herein makes plain that documents, consisting of handwritten notes of the Agents' oral interviews of the Government's witness, did exist and that those notes were destroyed by the Agents. This destruction took the notes out of existence and made it impossible for the Court to determine whether the petitioner was entitled to all or any of them.

Since production of the notes to the Court, and perhaps to the defendant was a right of the petitioner, the Courts below could not speculate whether the petitioner could have used them effectively. *Clancy* v. *United States*, 365 U.S. 312 (1961).

Indeed, the Second Circuit in *United States* v. *Consolidated Laundries Corporation*, 291 Fed. 2d 563 (2nd Cir., 1961) held that the Government has the duty to keep "evidence of which it was custodian in such a manner that it would be available for use at a trial by all parties."

It would be an easy matter in an investigative situation for a Government Agent to prepare either a summary of a statement of a Government witness, or, with the help of the witness, a new statement, which the witness would be willing to sign, and then to destroy the prior recording or substantially verbatim notes which were taken of the earlier oral statement. Good

faith or bad faith in the destruction of the notes is completely immaterial. Title 18, Section 3500 cannot be used to end discovery of that which the Government Agents do not wish the defendant to have.

Due process requirements demand that a defendant receive a fair trial. The Government may not force the petitioner's choice of what document he will demand, or what recording of which of the witness's statements he wants. The petitioner is entitled to any and all statements meeting statutory requirements. The Government may not destroy the ability of the Court to fulfill its statutory duty of resolving any doubts. The destruction of the notes, here, made it impossible for the Trial Court to fulfill its duty.

It also is respectfully submitted that this petitioner received no memoranda of any kind of the Government witnesses' oral statements made to F.B.I. Agents in New York City. The typewritten and signed statements which petitioner received pursuant to Title 18, Section 3500(e)(1) cannot be a substitute for the substantially verbatim recital of an oral statement recorded contemporaneously with the making of the oral statement, to which petitioner was entitled pursuant to Title 18, Section 3500(e)(2). These two subsections of Section 3500 are not alternative, but supplementary. If petitioner may have been entitled to a document under any section of 3500, such document must be produced. *Clancy v. United States, supra.*

The Court below found (Appendix B, *infra*, pp. 32, 33) "There was no proof that the handwritten notes came within the purview of paragraphs (e)(1) or (2) of Section 3500." In fact, the Agent testified

that he did not take a verbatim statement." Under the statute and the rulings of this Court, the petitioner need not prove, and, indeed, under normal circumstances, would not have the evidence to prove, that the handwritten notes came within the purview of paragraphs (e) (1) or (2) of Section 3500. Only the Trial Court, by inspecting the handwritten notes *in camera* and holding a *voir dire* with relation to the handwritten notes which it had already inspected, could make such a finding.

Petitioner submits that the Court below interpreted Title 18, Section 3500 in a manner contradictory to the opinions of this Court, and deprived the petitioner of the right to have the Trial Court inspect the handwritten notes of the F.B.I. Agents *in camera* to determine whether he was entitled to any or all of those notes for the purpose of cross-examining the prosecution's witnesses. Such destruction of the handwritten notes by the Government Agents was a refusal to comply, under subsection (d) of Title 18, Section 3500, requiring the imposition of sanctions.

2. The second point relied upon by the petitioner as to why this Court should grant a Writ of Certiorari is whether the Court below was correct in finding that the language of Title 18 U.S.C. 2314 and 2315 "is broad enough to justify the Federal Courts in applying the statute whenever they determine that the securities were stolen in another country" (Appendix B, *infra*, p. 36) and whether the Court below applied a correct presumption when it held: "In the absence of citation of statutes or decisional authority to the contrary we may presume that these securities would be considered stolen under Canadian Law." (Appendix B, *infra*, p. 36).

We respectfully submit that the Court below applied Title 18 U.S.C. 2314 and 2315 extraterritorially and made a presumption contrary to that held proper under the decisions of this Court.

The Court below cited no authority for its holdings on this point.

The elements of the offenses described by Title 18, Sections 2314 and 2315 are (1) there must be a transportation or receipt of stolen property, (2) the property must have been of the character of stolen property before it was transported in interstate commerce or received (*Lotsaw* v. *United States*, 243 F. 2d 27, (C.A. Mo. 1957)); (3) the person accused must be proven to have knowledge that the property was stolen.

Under the indictment at bar it is impossible for our Courts to determine whether the securities named in the indictment were "stolen" because the act of acquisition of the securities took place and was completed in the Dominion of Canada, outside of the jurisdictional limits of the Courts of the United States, by a person or persons unnamed in the indictment.

The only American case on point which we have found is *Territory* v. *Heflin*, 35 Pac. 618 (Supreme Court of Arizona, 1893). There the accused were indicted for grand larceny in Mexico and bringing the stolen property into the Territory of Arizona. The indictment was brought under a section of the Territory of Arizona Penal Code, which provided that whoever, in another state or country, steals the property

of another and brings it into the Territory of Arizona, may be convicted and punished as if the larceny had been committed in the Territory of Arizona.

The Court found that the statute violated the 6th Amendment of the Constitution of the United States.

The concept that the securities were "stolen" is part of a United States Criminal Statute.

It is an accepted canon of construction that the coverage of a Federal statute will not extend beyond our national boundaries unless such legislative intent clearly appears; and that legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *N. Y. Central* v. *Chisolm*, 268 U.S. 29 (1925); *The Antelope*, 10 Wheat. 66 (1825); and that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

In 18 U.S.C., 2314 and 2315, there is no legislative intent demonstrated that the coverage of the statutes should extend beyond our national boundaries.

That which may be characterized a crime under our statutes may not be characterized a crime in Canada, where the acts took place. That which may be characterized as having been stolen in the United States may not be characterized as stolen in Canada, and *vice versa*.

The characterization of an act in the foreign sovereignty must be determined under its laws, and because the Courts of the United States do not have jurisdiction to characterize the acts which took place

in a foreign sovereignty by an unknown, who may or may not be a foreign national, there is no way for a Court of the United States to determine whether the securities listed in the indictment herein were of the class included within the meaning of the statutes.

In an old English case, *Reg. v. Doyniel*, 11 Cox, C. C. 207, Western Circuit, Devon Summer Assizes, 1861, there was an indictment in which the first count charged larceny and the second count was for receiving. The defendant had ravaged a house on the Island of Guernsey and taken the stolen property to England, where he was apprehended. The Court held that the prisoner could not be convicted in England either of larceny or of receiving since the Island of Guernsey was not a part of the United Kingdom. See also *Reg. v. Carr & Wilson*, 15 Cox, C. C. 131, Crown Cases Reserved, 1882.

The petitioner submits that the charges in the indictment were founded upon completed acts in the Dominion of Canada by a person or persons unknown and there is no way of determining whether those acts are identical to those required by Title 18 U.S.C. 2314 and 2315. Since those acts are basic to the criminal charge herein, the Courts of the United States cannot apply our criminal statutes to determine their characterization. Nor can our Courts make a determination under the Canadian Law.

Indeed, two different sets of law, such as those of two separate national sovereignties, with different histories, heritages, and different lines of legal interpretation, can never be exactly the same and can never create exactly the same crime. This would be true even if statutes of two different countries contained identical language.

3. The third important point relied on by the petitioner, as to why this Court should grant a Writ of Certiorari, involves the question of whether the petitioner could be tried constitutionally, where the central act of the crime, the alleged stealing of the bonds, took place in a foreign country, thus denying the petitioner the Sixth Amendment absolute right of compulsory process to compel witnesses to appear, with regard to the stealing.

The Court below held that the Sixth Amendment to the Constitution of the United States "can give the right to compulsory process only where it is within the power of the Federal Government to provide it" (Appendix B, *infra*, p. 37a), thus acknowledging that in this situation the Court could not enforce compulsory process. The Court below said also that "the fact that appellant could not compel the attendance of an unnamed witness, for whom he never asked, did not deprive him of any Constitutional right" (Appendix B, *infra*, p. 37a).

No authority was cited for these holdings.

The only method known to the petitioner by which he could have been enabled to take a deposition of a witness in a foreign country would be pursuant to Rule 15 of the Federal Rules of Criminal Procedure. Rule 15 permits depositions to be taken only by order of the Court, made in the exercise of discretion, and on notice to all parties. Furthermore, the taking of depositions under this Rule is dependent upon the voluntary cooperation of the foreign national whose testimony is sought.

Petitioner respectfully submits that no discretionary process can fulfill the absolute right to compulsory process. If the petitioner had applied to bring witnesses from Canada, as suggested by the Court below, he still could not have compelled an unfriendly witness to appear.

The petitioner, pursuant to the Sixth Amendment, could not be deprived of the right to have any witness appear, whom the petitioner believed might offer proof to negate the Government's evidence or to support the petitioner's defense. *U.S. v. Seeger*, 180 F. Supp. 467 (D.C.S.D. N.Y., 1960). To deprive the petitioner of this free and unfettered absolute right, was to deprive him of the essential tools of conducting his defense. No Executive, Legislative or Judicial Act may circumvent this traditional and Constitutional guarantee.

We have been able to find only two cases which have considered this important point. In *Territory v. Hefley, supra*, the Court found that the defendants were deprived of their right to compulsory process. Since the larceny therein had been committed outside the Territory of Arizona, where the process of the Court could not run, there was a presumption that the witnesses to disprove the larceny were not amenable to the Court's process, and the right of actual attendance of witnesses was, therefore, of necessity denied unconstitutionally.

In *Gillars v. United States*, 182 Fed. 2d 962 (D.C. C.A., D.C. 1950), this Constitutional problem was raised, but not decided since the foreign witnesses had been brought into the United States by the Government.

This important Constitutional question, to the best knowledge of the petitioner, has not been, and should be, settled by this Court. It is submitted that petitioner had no remedy to compel witnesses to refute the Government's evidence tending to prove that the securities in question were actually stolen. The statutes as applied herein necessarily deny the petitioner his Constitutional right to compulsory process. The Sixth Amendment guarantees compulsory process as an absolute right of defendants in criminal cases. To suggest, as did the Court below, that such right be dependent upon the cooperation of the prosecution or of foreign Governments, or of persons not subject to compulsory process, is improper.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes

TITLE 18, U.S.C.

§2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507.

§ 315. Sale or receipt of stolen goods, securities, or monies

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any

tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used or has been so used in falsely making, forging, altering, or counterfeiting any security, or any part thereof

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Appendix A

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the

defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States, and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for the use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

ment made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

Federal Rules of Criminal Procedure

Rule 15. *Depositions.*

(a) *Where Taken.* If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) *Notice of Taking.* The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

Appendix A

(c) *Defendant's Counsel and Payment of Expenses.* If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) *How Taken.* A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) *Use.* At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of a witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

Appendix A

(f) *Objections to Admissibility.* Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

Amendments to the Constitution of the United States

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his fav and to have the Assistance of Counsel for his defense.

APPENDIX B

Opinion and Judgment

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 162—September Term, 1961.

(Argued November 16, 1961

Decided January 12, 1962.)

Docket No. 27166

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN D. GIACCO,

Defendant-Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Southern District of New York convicting defendant of transporting and receiving stolen Canadian securities in violation of 18 U. S. C. §§ 2314 and 2315, and of conspiring to com-

mit these offenses in violation of 18 U. S. C. §371, after a trial without a jury before Thomas F. Murphy, *J.*

Affirmed.

John D. Rorder, New York, N. Y. (Carey & Carey, New York, N. Y., on the brief; Jacob J. Rosenblum and Anthony J. Obadal, of counsel), *for Defendant-Appellant.*

Gerald E. Pally, Assistant United States Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney for the Southern District of New York, on the brief; Arthur I. Rosett, Assistant United States Attorney, of counsel), *for Appellee.*

Moore, *Circuit Judge*:

Defendant, John D. Greco, appeals from a judgment of conviction entered by the district court after a trial without a jury under an indictment charging defendant with transporting and receiving stolen Canadian securities in violation of 18 U. S. C. §§2311 and 2315, and with conspiring with his codefendant, Edward B. Loree, to commit these offenses in violation of 18 U. S. C. §371. Loree pleaded guilty prior to trial and was the government's principal witness.

Loree testified that early in April, 1958, Greco, whom he had met previously, proposed that Loree sell some Canadian bonds for him; that at a second meet-

ing. Greco told him that the bonds were stolen; that Greco in New York delivered to him Canadian bonds in the face amount of $36,500, which Loree subsequently took to Miami, Florida; and that he (Loree) was arrested by the FBI in Florida with the bonds in his possession.

Greco did not take the stand. The only witness called by the defense was a disbarred attorney who was serving a prison term for larceny. He testified that he talked to Loree a few days after Loree was arrested; that Loree told him that he knew Greco and that Greco had been arrested also; that Greco had nothing to do with the "hot" bonds; but that he (Loree) intended to take full advantage of Greco's arrest in an attempt to get himself out of the mess. Although other grounds for reversal are argued, appellant's principal ground is the alleged failure of the Government to produce certain handwritten notes made by FBI agents during interviews with Government witnesses Loree and DeKoninck. So many factual situations, each slightly different from the others, have been (and are being) presented to the courts since the enactment of the so-called Jencks Act (18 U. S. C. §3500) that it would be expected that every fact possibility would have been adjudicated by now. Any such hope is obviously unrealistic and would show a failure to appreciate the resourcefulness and imagination of the legal mind and able defense counsel. Because these factual variations have formed the basis for the various decisions in this field, a rather detailed review of the facts must be made. Any attempt in this case to review all the decisions on the subject

and to give to the trial judges, present and future, an infallible guide to all rulings on Jencks Act questions is quickly abandoned as highly presumptuous and impossible, tempting though it be.

Loree was apprehended in Miami by Agents of the FBI on April 22, 1958, and was immediately interviewed. Handwritten notes (not verbatim statements) were taken by the Agents. From these notes more complete reports of the interview were subsequently prepared. Two documents relating to this interview were produced and given to appellant, one (Exh. 2 *id.*) an unsigned statement of Loree, dated April 22, 1958, and the other (Exh. 6 *id.*) consisting of two FBI office memoranda (one of nine pages), dictated May 9, 1958, and dated May 14, 1958. The key fact is found in the stipulation of defense counsel that the FBI Agents would have testified that these two exhibits reflected the contents of the notes and that the notes were destroyed after the reports were completed. There was no testimony contradictory of this fact.

In addition, the government delivered to defense counsel during Loree's cross-examination other statements relating to Loree's interview and a twenty-page transcription of his grand jury testimony. As to the witness DeKoninck, the Agent's testimony was similar. He made notes, dictated statements, compared the reports with his notes and after he saw that the reports (Exhs. 4 and 8) fully reflected the material in the notes, he destroyed the notes. There was no proof that the handwritten notes came within the purview of paragraph (e) (1) or (2) of Section 3500 in

fact, the Agent testified that he did not take a verbatim statement. Another Agent gave similar testimony as to another report (Exh. 3 *id.*) dealing with Loree.

Apparently having found nothing in the mass of material turned over by the government to weaken the witnesses' testimony and choosing to give no weight to the Agents' testimony of accuracy in transcription, appellant seeks to have the court assume that in the destroyed handwritten notes, there must have been a veritable gold mine of cross-examination material. In so arguing, appellant raises the same question urged upon the Supreme Court in *United States v. Campbell*, 365 U. S. 85 (1961), namely, "that destruction [of notes] without regard to the circumstances should be so regarded [i.e., as non-compliance under 3500]" (p. 98). But just as the Supreme Court concluded that "this [Campbell] record affords us no opportunity to decide this important question of the construction of subsection (d)," so is it to be doubted that Greco provides a proper vehicle.

In *Campbell*, the Supreme Court was concerned over the absence of facts concerning the "Interview Report" which the trial judge did not deliver to defense counsel. The Court, therefore, remanded for further inquiry limited to the circumstances surrounding the preparation of the "Interview Report," stressing the availability of the Agent who was not called. Here all material elements found lacking in *Campbell* are present. The Agents principally involved presented themselves for cross-examination; as to others, defense counsel stipulated to the facts they would recite. Re-

ports or statements were not withheld by the trial judge or the government. All material in existence covered by Section 3500 and much not included therein was made available to the defense.

There is no need to review *in extenso* the history of Section 3500 or the cases thereunder. The two opinions by Justices Brennan and Frankfurter in *Campbell* fully discuss the procedures to be followed in preliminary investigations by the trial court as to whether there has been proper compliance with the statute. See, also, *United States v. Crosby*, 2 Cir., 1961, 294 F. 2d 928. Congress, in using the words "possession" and "elects not to comply," clearly was not addressing itself to non-existent notes. Nor is there any legislative requirement that all notes be preserved after transcriptions have been made and checked for accuracy. To date there has been no convincing proof that truth is to be found only in handwritten notes and that, therefore, special sanctity should be attached thereto. Section 3500 "designed to further the fair and just administration of criminal justice" (*Campbell*, p. 92) should not be dependent for its efficacy to accomplish its purpose upon mechanical means. If accuracy is to be found only in pencil and pen, then typewriters, tape recorders, dictaphones and all the paraphernalia of the business machine industry should be excluded from the courtroom. Actually, if there be any basis for any such assumption, the thought and deliberation which went into statements slowly written with a quill pen must have suffered in quality upon the invention of the rapid and less deliberate fountain pen.

Appendix B

There is no evidence that the notes were destroyed with intent to suppress evidence. Nor is any such claim made on appeal. Appellant argues that whether or not there was intent to suppress evidence, the destruction of the notes was tantamount to a refusal to produce the statements, thus requiring the imposition of Section 3500 sanctions. However, we have already held that such a situation does not amount to a refusal by the government to produce a statement "in the possession of the United States." *United States v. Thomas*, 2 Cir., 1960, 282 F. 2d 191, 194. We still are not convinced that in words or in spirit the Jencks Act imposes a duty on FBI agents to preserve notes which are taken and used only as a guide in preparing a formal statement for the witness to sign. While the majority opinion in *Campbell* observed that they had no opportunity to decide this question, Mr. Justice Frankfurter in a separate opinion pointed out that "nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government" (p. 109).

Appellant also argues that there was insufficient evidence for the trial court to infer that the bonds involved were stolen. However, a hole cut in a bank vault wall, an acetylene torch lying nearby and testimony (by stipulation) that the bonds involved in this case were among those missing are facts sufficient to support an inference of theft.

Appendix B

Another alleged error was the failure to grant a motion to strike certain testimony relating to prior similar transactions by the appellant. This testimony was admitted as evidence that appellant knew the Canadian bonds were stolen. Appellant does not claim that such evidence was inadmissible, but only that the prior transactions were not sufficiently established. However, testimony that appellant had attempted to dispose of Series E bonds, not in his name through a private individual for less than one-half of their face value certainly could support an inference that appellant was attempting to dispose of bonds he knew to be stolen. Moreover, this case was tried before a judge (sitting without a jury) who could properly evaluate this testimony without prejudice to appellant.

Appellant contends that the federal statutes involved are not applicable when the securities were not stolen in this country. However, the language of the present statute is broad enough to justify the federal courts in applying the statute wherever they determine that the securities were stolen in another country. We are not here concerned with the unlikely case where the goods or securities might be "stolen" according to the laws of one of the two countries and yet not be "stolen" according to the laws of the other country. In the absence of citation of statutes or decisional authority to the contrary, we may presume that these securities would be considered stolen under Canadian law.

Finally, appellant would have us reverse on the ground that he was denied his constitutional right to compulsory process. No application was made to bring witnesses from Canada and no motion was made to

take testimony abroad. At no time did appellant state what witnesses, if any, he would have liked to bring to this country. Rather, he argues that he was convicted in violation of the Sixth Amendment since an essential element of the crimes charged was the theft which occurred in Canada and he did not have an *absolute* right to compel the attendance of Canadian witnesses on this issue. However, the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it. Otherwise any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor. The fact that appellant could not compel the attendance of an unnamed witness for whom he never asked did not deprive him of any constitutional right.

The judgment of conviction is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January one thousand nine hundred and sixty-two.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN D. GRECO,
Defendant-Appellant.

EDWARD B. LOEB,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JANUARY 12, 1962
A. DANIEL FUSARO, CLERK